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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 985

NEUHOFF BROS. PACKERS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on June 17, 1966.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals, printed in Appendix B hereto, infra p. B-1, is reported in 362 F. 2d 611.

JURISDICTION

The judgment of the Court of Appeals was entered on the 17th day of June, 1966, R. 20, Appendix B hereto, p. B-1, infra. Rehearing was denied on November 16, 1966,

R. 53; Appendix B hereto, p. B-14, infra. The jurisdiction of this Court is invoked under 28 U.S.C.A., § 1254(1).

QUESTIONS PRESENTED

1. Has Petitioner been denied due process of law by the action of the National Labor Relations Board[1] in finding Petitioner guilty of the unfair labor practice of refusing to bargain with a union when the Petitioner has raised substantial factual issues as to whether or not the union is the duly certified bargaining agent of the Petitioner's employees, and such unfair labor practice finding of the Board was made without any hearing.

2. Can the Board, in an unfair labor practice proceeding, find Petitioner guilty of the unfair labor practice of refusing to bargain with a union without affording the Petitioner any hearing of any kind or character under the following circumstances:

a. In a certification election concerning the Petitioner's employees a majority of the votes cast were against the petitioning union;

b. The Union objected to certain conduct affecting the outcome of this election and it was set aside based solely upon an ex parte investigation of the Board's Regional Director and no hearing was had in connection therewith;

c. In a second election a majority of the votes cast were in favor of the petitioning union;

d. The Petitioner filed objections to union conduct and to conduct of Board employees who held such elec-

[1] The National Labor Relations Board will be referred to in this petition as the "Board".

tion and maintained that such conduct prejudicially affected the outcome of such second election;

e. The objections of Petitioner to the conduct affecting the outcome of the second election were overruled by the Board's Regional Director based upon his ex parte investigation and no hearing was had in connection therewith;

f. The Petitioner requested a hearing with respect to the actions of the Board's Regional Director in setting aside the first election and in refusing to set aside the second election and offered proof that such actions on the part of the Board's Regional Director were erroneous.

3. When an employer has raised substantial factual issues as to whether or not a union is the duly certified bargaining agent of its employees, is it incumbent upon the Board, at some time prior to finding the employer guilty of the unfair labor practice of refusal to bargain, to afford such employer a hearing with respect to whether such union is, in fact, the duly certified bargaining agent of such employees.

4. Under the provisions of the Labor Management Relations Act, 1947, and the Administrative Procedure Act, may the Board, in an unfair labor practice proceeding wherein an employer is charged with the unfair labor practice of refusing to bargain, enter an order finding such employer guilty of such unfair labor practice without affording the employer any hearing with respect to whether or not the union is the duly certified bargaining agent of the employer's employees.

STATUTES INVOLVED

The statutory provisions involved are § 10(b) of the Labor Management Relations Act, 1947, 29 U.S.C.A. § 160,

C. 120 § 10, 61 Stat. 146, as amended, § 72 Stat. 945, as amended, § 704(d), 706, 73 Stat. 544 and § 5 of the Administrative Procedure Act, 5 U.S.C.A., § 1004, C. 324, § 5, 60 Stat. 239. The above statutes are printed in Appendix A, infra, pp. A-1 through A-4.

STATEMENT

This suit arises out of the Board's Decision that the Petitioner was guilty of the unfair labor practice of refusal to bargain with the United Packinghouse, Food and Allied Workers, AFL-CIO[2] (Rl, 382-385)[3]. This finding was made by the Board without any hearing of any kind or character being afforded to Petitioner and was, as pointed out by the Court below, "in effect, the grant of summary judgment" (Appendix B hereto, page B-4, 362 Fed. 2d 611). The court below had jurisdiction of the case pursuant to Sec. 10(f) of the Labor Management Relations Act, 1947.

In July of 1964 the Union filed a Petition for Certification as bargaining agent of Petitioner's employees (Rl, 1). A hearing was held on the Union's "Petition for Certification" and the Board's Regional Director rendered a "Decision and Direction of Election" during August of 1964 (Rl, 13).

In September of 1964 an election was conducted resulting in 347 votes being cast against the union, 315 votes being cast for the union and 43 ballots being challenged

[2] This Union will hereinafter be referred to as "The Union".

[3] References to the Record, such as "Rl, ...", will refer to the page number in the Transcript of the Record, such entire Transcript, consisting of 385 pages, being indexed in the Record in this Court as "Printed Record page 1".

(Rl, 42). The Union filed numerous objections to certain alleged conduct of Petitioner (Rl, 45-51), and in January of 1965 the Board's Regional Director, after conducting an ex parte investigation over Petitioner's objections, sustained two of the Union's objections to the election and set the election aside (Rl, 53-92).

The Board's Regional Director, after conducting his ex parte investigation, set such election aside on the following grounds:

> (1) That Petitioner had prevented three persons from entering the company premises to cast ballots even though such persons were not eligible to vote; and
>
> (2) That an unidentified and indeterminate number of Petitioner's supervisors engaged in individual interviews with an unidentified and indeterminate number of employees prior to the election and allegedly urged such employees to vote against the union.

Petitioner was not afforded any hearing with respect to the Union's objections to the election, and the Board's Regional Director's decision to set such election aside was based entirely upon his ex parte investigation (Rl, 53-92).

With respect to the 43 challenged ballots the Board's Regional Director sustained 17 of such challenges and ruled that such employees were not entitled to vote in the election (Rl, 91). No hearing was conducted by the Board's Regional Director with respect to whether or not such employees were entitled to vote in the election, and the determination on his part that they were not entitled to vote was based solely on his ex parte investigation.

Petitioner timely filed with the Board its "Request For Review" of the Board's Regional Director's Order setting aside the election and of his determination with respect to the challenged ballots and, in requesting a hearing with respect to such Order, pointed out that in arriving at his decision the Regional Director had made a number of factual findings which Petitioner offered to prove were erroneous (Rl, 92-117). This request was summarily denied by the Board (Rl, 119).

In February of 1965, a second election was held and in the second election 388 votes were cast for the Union, 295 votes were case against the Union, and 58 votes were challenged (Rl, 126).

During the course of the second election, 15 of the employees whose votes had been challenged in the prior election and whom the Board's Regional Director had found ineligible to vote as a result of his ex parte investigation, presented themselves at the polls to vote. Thirteen of such individuals were refused a ballot by the agents of the Board's Regional Director, and two of such individuals were allowed to vote challenged ballots after questioning by such Board agents (Rl, 135-165).

Petitioner filed its Objections To Conduct Affecting The Results Of The Election and requested a hearing on such Objections (Rl, 128-162). Therein Petitioner strenuously insisted that the conduct of the Board's agents in refusing to allow the 13 employees to cast ballots in the election had prejudicially affected the outcome of such election and requested a hearing in order that such fact might be estab-

lished. *The Board's Regional Director, without conducting any hearing of any kind, overruled all of Petitioner's objections to such election and certified the Union as the bargaining agent of Petitioner's employees* (Rl, 164-172). Petitioner timely filed its "Request For Review" with the Board (Rl, 173), and such request was summarily refused (Rl, 190-191).

The Union demanded that Petitioner bargain with it and Petitioner declined to bargain on the ground that the Union was not the duly certified bargaining agent of Petitioner's employees. The Union filed an unfair labor practice charge against Petitioner alleging that Petitioner was guilty of the unfair labor practice of refusal to bargain (Rl, 191-194). The Regional Director then issued his Complaint and Notice of Hearing (Rl, 195). However, prior to any hearing on the Complaint, the Board's General Counsel filed a Motion For Summary Judgment and asserted that Petitioner should be found to have committed the alleged unfair labor practice solely on the pleadings in the case (Rl, 351). In response to this Motion, the Petitioner filed its Offer Of Proof (Rl, 311) wherein it again requested a hearing and offered to prove, in addition to other pertinent factual issues in dispute, that the refusal by the Board agents to allow the thirteen employees to vote in the second election "in the presence of other voters" and at the place and in the manner in which it was done "was calculated to and did in fact persuade voters observing such conduct that the 'Federal Government was taking sides and * * * urging employees to vote for one party', i.e., the Union" (Rl, 325).

In spite of this disputed fact issue and Petitioner's request for a hearing thereon, the Board's Motion For Summary Judgment was granted by the Trial Examiner who recommended that the Petitioner be ordered to bargain with the Union (Rl, 358).

In granting the Motion for Summary Judgment, the Trial Examiner found that he was bound by the refusal of the Board to review the Regional Director's action in setting aside the first election and in refusing to set aside the second election (Rl, 365). Therefore, he concluded that since he was bound by such Board action there was no necessity for conducting a hearing with respect to the alleged unfair labor practice (Rl, 365).

Petitioner duly excepted to the Trial Examiner's Decision (Rl, 371), but such exceptions were overruled by the Board *without a hearing* and the Board ordered Petitioner, upon request, to bargain with the Union (Rl, 382).

The Court of Appeals For the Fifth Circuit, after finding "This case is not without difficulty.", held that "In spite of the difficulties of the case * * *" the order of the Board should be enforced.[4]

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in the instant case (Appendix B hereto, p. B-1) is directly in conflict with the decisions of the Court of Appeals for the Fourth Circuit in *National Labor Relations Board v. The Lord Baltimore Press, Inc.*, 300 Fed. 2d 671 (Appendix C infra p. C-6) and

[4] 362 Fed. 2d 615, Appendix B hereto infra., p. B-11.

National Labor Relations Board v. Poinsett Lumber & Manufacturing Co., 221 Fed. 2d 121 (Appendix C infra p. C-1) and the decision of the Court of Appeals for the Third Circuit in *National Labor Relations Board v. Capital Bakers, Inc.*, 351 Fed. 2d 45 (Appendix C infra, p. C-12).

In the Poinsett case a certification election was conducted under the supervision of the Board and the Union received a very slight majority of the votes cast. The employer contended that the Union's victory was achieved as a result of threats and pressures exerted on behalf of the Union and, as Petitioner did in this case, duly filed Objections to the Election raising substantial questions as to the conduct of the Union. The Employer also requested a hearing with regard to such objections.

Instead of ordering a hearing the Board, as in this case, acted upon the investigation report of its Regional Director and certified the Union as Bargaining Representative notwithstanding the objections of the Company and its request for a hearing. At the unfair labor practice hearing the Company offered evidence of the threats and coercion of which it alleged the Union had been guilty but this evidence was excluded by the Trial Examiner.

In setting aside the order of the Board finding the Employer guilty of the unfair labor practice of refusal to bargain the Court, after citing Section 102.61 of the Rules and Regulations of the Board, held:

> "If the Board had granted a hearing in accordance with this rule,[5] the evidence taken thereon would have been

[5] Section 102.61 of the Rules & Regulations of the National Labor Relations Board.

made a part of the record in the representation proceeding and would have been before the Board in the unfair labor practice hearing and before this court on the review of the Board's action taken with respect thereto. 29 U.S.C.A. 159(d). The Board, however, did not grant a hearing to the company but acted upon an investigation made by its Regional Director at which the company was given no opportunity to present the evidence upon which it relied in support of the substantial questions which it had raised as to the validity of the election by the exceptions which it had filed thereto. The Board determined that the questions were not substantial on the basis of the report filed by the Regional Director without affording the company an opportunity to be heard and without having before it the evidence upon which the Regional Director had based his report. Under such circumstances, we think that the company was entitled to present its evidence at the unfair labor practice hearing before the Trial Examiner and that the order should be set aside and the cause remanded to the Board in order that the evidence may be taken and considered by the Board in passing upon the validity of the election.

If a hearing had been held and the evidence had been taken and passed upon by the Board in the representation proceeding, the Board would not be required to go into the matter again in the absence of special circumstances showing that it was in the interest of justice that this be done; *but the evidence has not been taken nor a hearing accorded the company at any time even though substantial questions affecting the validity of the election had unquestionably been raised by its exceptions. We think it is entitiled to a hearing at some stage of the proceedings so that it may produce the evidence upon which it relies for consideration by the Board and for consideration by this court in proceedings to enforce or set aside the Board's order.*" (Emphasis added)

In the instant case Petitioner has been denied a hearing with respect to whether or not the first election should have

been set aside, whether or not the 13 employees found by the Board's Regional Director to be supervisors were in fact supervisors, whether or not the second election should have been set aside, and whether or not the Union is the duly certified bargaining agent of Petitioner's employees. Certainly "at some stage of the proceeding" it should be entitled to a hearing in order that this Court may have some record upon which to base its decision as to whether or not the Board's order should be enforced.

In the Baltimore case, the employer resisted the Order of the Board requiring it to bargain with the Union upon the basis that the election favoring the Union as the collective bargaining representative of Baltimore's employees was unfairly conducted. In such case the employer contended that immediately prior to the election, supervisory personnel engaged in organizing and other activities on behalf of the Union. The Board's Regional Director, as in this case, conducted an ex parte investigation and concluded that the employer's objection should be overruled. Baltimore filed exceptions to this finding of the Regional Director, and the Board denied such exceptions without a hearing. Upon Baltimore's refusal to bargain with the Union, the Board issued a Complaint accusing Baltimore of the unfair labor practice of refusal to bargain.

Upon hearing on this Complaint, Baltimore offered evidence purporting to show that one of its supervisors had engaged in organizing and other activities on behalf of the Union. This evidence the Trial Examiner declined to hear because he was of the opinion that as the Board had already ruled on such issue, the question was no longer open. In

setting aside the Board's Order and directing the Board to hear evidence with respect to Baltimore's objection to the election, the Court again held that as in the Poinsett case the employer was "* * * entitled to a hearing at some stage of the proceedings * * *".

In the Capital Bakers case, the Union challenged two ballots in a certification election. The Board's Regional Director sustained one of the challenges on the basis of an ex parte investigation. The employer requested and was denied a hearing on the question of the challenged ballot. The Board denied the employer's Request for Review. At the hearing before the Trial Examiner in the unfair labor practice proceeding, the Employer challenged the finding of the Regional Director with respect to the challenged ballot, but the Trial Examiner rejected an offer of evidence with respect to such challenged ballot on the ground that such issue had already been determined by the Board's denial of the Petition for Review. In considering whether or not the employer was entitled to a hearing, the Court made the following observations:

> "The extensive nature of the Regional Director's report in which he details the results of his investigation of the supervisory nature of the duties of the challenged employee clearly establishes the existence of such 'substantial and material factual issues'. The printed record contains over five pages of discussion of the factual bases for his determination. Yet all of the evidence upon which he relied is derived from statements which were not subject to cross-examination or confrontation or to any legal tests for determining their use or weight as evidence * * *.

> * * * The Regional Director's report on the post-election ballot challenges reveals that he at least collected a considerable amount of information, whatever probative value it may have to support a conclusion that the employee was supervisory. Respondent requested an opportunity to have these facts determined by a hearing. This was denied, and its subsequent request to the Board for hearing was denied. The nature of the evidence which respondent wished to present is revealed both in its Request for Review and its offer of proof before the Trial Examiner on the unfair labor practice proceeding. The respondent there set forth in detail several factual matters which it offered to prove to contradict facts found by the examiner in his report based on ex parte investigation. Respondent's offer of proof also contained clearly relevant facts which were not mentioned in the Regional Director's findings. *We are not concerned with the question of whether or not the evidence considered by the Regional Director is sufficient to support his findings, or whether the rejected evidence of respondent would overcome the findings; we are solely concerned with the fact that the offer and the findings raise a substantial conflict of fact which the Board's Rules and Regulations require to be determined by a hearing. If this was not apparent to the Board at any prior stage it became clearly apparent at the Trial Examiner's hearing. The circumstances compelled a hearing, at the very least, at this state.*" (Emphasis added.)

As reflected by the quoted portions of the Court's opinion, the Court noted that the printed record contained over five pages of discussion of the factual bases for the Board's Regional Director's determination that the challenge to the employee's ballot should be sustained. In this connection, the Petitioner would point out to the Court that the printed record in this case reflects that approximately 29 pages of

such record are made up of the Board's Regional Director's "* * * discussion of the factual bases for his determination."

As has been pointed out in the statement hereof, the Trial Examiner felt that he could not hear evidence with respect to whether or not the Board's Regional Director was justified in setting aside the first election or with respect to whether or not he was justified in refusing to set aside the second election. This opinion of the Trial Examiner was based upon his conclusion that since the Board had refused to review these actions of its' Regional Director, such actions were no longer open to question. This finding of the Trial Examiner has been affirmed by the Court of Appeals for the Fifth Circuit and is in direct and irreconciable conflict with the decisions in the Poinsett, Baltimore and Capital cases cited above.

Obviously the decisions in the Poinsett, Baltimore and Capital cases are correct and the decision of the Court below in the instant case should be reversed. Otherwise the Petitioner will have been deprived of its inalienable right to due process of law by the refusal of the Board and the Court below to afford Petitioner a hearing in order that it may present evidence in support of its contentions and cross-examine those witnesses upon whom the Board's Regional Director relied in reaching his decision.

That the decisions in the Poinsett, Capital and Lord Baltimore cases are correct is clearly reflected by the fol-

lowing holding of this Court in *NLRB v. Indiana and Michigan Electric Company*, 318 U.S. 9, 63 Sup. Ct. 394, 87 L. Ed. 579.

> "The Act accords a great degree of finality to the Board's findings of fact, and this Court has been insistent that the admonition of the Act be strictly observed. But courts which are required upon a limited review to lend their enforcement powers to the Board's orders are granted some discretion to see that the hearings out of which the conclusive findings emanate do not shut off a party's right to produce evidence or conduct cross examination material to the issue. The statute demands respect for the judgment of the Board as to what the evidence proves. *But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support its findings, is heard and weighed*". (Emphasis added.)

Unquestionably it cannot be said that the findings upon which Petitioner in this case has been held to be guilty of an unfair labor practice "have been fairly reached" in light of the fact that Petitioner has been absolutely denied any opportunity to adduce "material evidence which might impeach" the findings of the Regional Director.

Although other courts of appeals and this Honorable Court have stated that Petitioner is entitled to be heard in this matter it is respectfully submitted that Petitioner has been denied a hearing on at least four separate occasions during the course of this proceeding. At some stage

of the proceeding hearings should have been had on the following very hotly contested factual issues:

(1) Was the Board's Regional Director justified in setting aside the first election in which a majority of the employees voted against the Union as their Bargaining Agent? How can this Court, or any other court, know without a record upon which to base its review? Approximately 3½ pages of the record are devoted to the Board's Regional Director's discussion of his reason for setting such election aside. Such discussion is replete with statements such as the following: "Employees testify . . " (Rl, 67) "Employee Witnesses testify . . " (Rl, 67) "They further testify . ." (Rl, 67) "The individual supervisors state . . " (Rl, 68) Where did all this testimony take place? Who gave all of this testimony? When did these employees testify? Certainly no such testimony appears in this record because no hearing was conducted with respect to this matter.

How can it be denied that Petitioner was not entitled to a hearing with respect to all of this "testimony". At the very least it would appear that justice and fair play would dictate that Petitioner should be entitled to know the names of the people who gave all of this testimony. Unquestionably under *Jencks v. U. S.*, 353 U.S. 657, 77 Sup. Ct. 1007, 1 L. Ed. 2d 1103 Petitioner was entitled to at least read any statement given by these "Employee witnesses" and to cross-examine such "employee witnesses."

(2) Was the Board's Regional Director justified in finding that thirteen of the employees whose votes were challenged were supervisors and not entitled to vote? More than 14 pages of the Record (Rl, 76-91) are devoted to the Regional Director's discussion of the facts upon which he bases his conclusion that these employees are supervisors. Where did be get these facts? Who furnished this information? Is it correct? How can this Court or any other court know, because no hearing was conducted with respect thereto.

Here it should be pointed out that in this case the right of 13 individuals to vote in a matter vitally affecting their very livelihood has been denied and there is absolutely no record upon which this Court can base its consideration of whether or not such denial is justified. As pointed out by this Honorable Court, the right to vote is "precious" and "fundamental"[6] and certainly no employee should be denied the right to vote in a matter affecting whether or not he will be represented by Union without at least some semblance of a hearing.

(3) Was the Board's Regional Director justified in finding that the action of the Board Agents in refusing to allow 13 employees to vote, committed in the presence of other employees, did not affect the outcome of the election? What evidence did the Board's Regional Director base this decision on? It seems rather strange that the Board's Regional Director could conclude that the Petitioner's refusal to allow *three* employees to vote was sufficient to justify setting aside the first election but that the Board Agent's refusal to allow *thirteen* employees to vote was not sufficient to justify setting aside the second election.

(4) Was Petitioner obligated to bargain with the Union in this matter? Certainly not if the Regional Director was unjustified in setting aside the first election or in refusing to set aside the second election. However, no hearing has been had on this issue because a summary judgment was entered with respect thereto, even though the Petitioner strongly contested all of the factual findings of the Regional Director with respect to setting aside the first election, refusing to set aside the second election and his finding with respect to the supervisory status of the thirteen challenged employees. In this connection Petitioner also, at every possible juncture, demanded a hearing and offered proof that all such findings of the Regional Director were erroneous (Rl,

[6] *Harper v. Virginia State Board of Elections*, 86 Sup. Ct. 1079.

92-117, Rl, 128-163, Rl, 173-190, Rl, 214-223, Rl, 311-327, Rl, 371-382).

2. Unquestionably the questions presented in this case are of vital importance to the administration of the Labor Management Relations Act and settlement of this important question by this Honorable Court is plainly in the public interest because if the decision of the Court below is allowed to stand, all employers subject to such Act are at the mercy of the unbridled whim and caprice of the Board's Regional Directors.

As set out in the Poinsett, Baltimore and Capital cases, any employer at some stage in an unfair labor practice proceeding should be entitled to a hearing before it is found guilty of the unfair labor practice of refusal to bargain. Unquestionably, under all substantive and procedural rules regarding summary judgment practice, no such judgment should be entered when important factual issues have been raised by the party resisting a motion for summary judgment.

However, Petitioner has been unable in its research to find any case wherein this Court has expressed its views on this question. Certainly, this question should be settled by this Honorable Court in order that the administration of the Labor Management Relations Act will be uniform throughout these United Staates.

The extreme vice of the decision of this case is readily apparent when one considers the possible consequences which can ensue in cases of this type. For the purpose of illustrating such vice, let us assume that in a hypothetical

situation an election is conducted wherein the majority of the votes are cast against the petitioning union and the union challenges the ballots of all employees with the exception of the union organizing committee. Then let us assume that the Regional Director, for reasons of his own, wishes the union to win such election and therefore sets such election aside based upon some alleged ex parte investigation and finds that none of the employees whose votes were challenged in the first election are entitled to vote in the second election. Thereafter the employer files a Request for Review with the Board and such Request is denied. The Regional Director, in furtherance of his desire that the union win such second election, then refuses to allow any employee to vote in the election with the exception of the members of the union organizing committee. Let us then assume that the union wins such election and the employer files objections to the election asserting that the conduct of the Board's agents in refusing to allow his employees to vote affected the outcome of the election. Let us further assume that the Regional Director overrules such objections and the Board refuses the employer's Request for Review.

It then necessarily follows that in a subsequent unfair labor practice proceeding the Trial Examiner will find, as the Trial Examiner did in this case, that he is bound by the refusal of the Board to review the action of the Regional Director in setting aside the first election and in refusing to set aside the second election. Under such facts, the Trial Examiner, if the decision in this case is allowed to

stand, would be justified in granting a summary judgment with respect to the alleged unfair labor practice of refusing to bargain with the union. Certainly, Congress in enacting the Labor Management Relations Act and the Administrative Procedure Act, never contemplated that an administrative body would have the power by such procedural gymnastics, to deny any citizen of these United States due process of law.

3. Unquestionably the Petition for a Writ of Certiorari should be granted because the character of reasons for granting the same fall squarely within the purview of this Honorable Court's Rule 19. As pointed out hereinbefore the Court below has decided a federal question of substance which has not heretofore been determined by this Court and such decision of the court below conflicts with the decisions of two other Courts of Appeal. Petitioner further submits that in denying Petitioner due process of law by refusing to afford Petitioner any hearing before finding it guilty of an unfair labor practice the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRITZ L. LYNE,

Fritz Lanham Lyne

CERTIFICATE OF SERVICE

I, FRITZ L. LYNE, attorney for Petitioner, certify that on this the 18th day of January, 1967, pursuant to Rule 33, Supreme Court Rules and in full compliance therewith, a copy of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed to The Solicitor General, Department of Justice, Washington 25, D. C., Marcell Mallet-Prevost, National Labor Relations Board, 1717 Pennsylvania Avenue, N. W., Washington, D. C., Mr. John Lavey, Counsel for the General Counsel, Room 8A24 Federal Office Building, 918 Taylor Street, Fort Worth, Texas 76102, and Mr. Steve R. Mauser, Field Representative, United Packinghouse, Food and Allied Workers of America, AFL-CIO, 2350½ North Main Street, Fort Worth, Texas, by depositing said copies in the United States mail, properly addressed, first class postage prepaid, certified return receipt requested, and the foregoing briefs mailed to The Solicitor General and Marcel Mallet-Prevost were mailed via air mail, postage prepaid.

Fritz Lanham Lyne

Fritz L. Lyne

APPENDIX A

Sec. 10(b), Labor Management Relations Act

PREVENTION OF UNFAIR LABOR PRACTICES

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony.

Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

Sec. 5, Administrative Procedure Act

§ 1004. Adjudications

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 1010 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

Notice of hearing and issues

(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall

give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

Procedure

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

Authority and functions of officers and employees

(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investiga-

tive or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

Declaratory orders

(d) The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty. June 11, 1946, c. 324, § 5, 60 Stat. 239.

APPENDIX B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22917

NEUHOFF BROS. PACKERS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Review of an Order of the National Labor Relations Board Sitting at Washington, D. C.

(June 17, 1966.)

Before TUTTLE, Chief Judge, RIVES, Circuit Judge, and CHOATE, District Judge.

TUTTLE, Chief Judge: This is a petition brought by the company to set aside an order of the National Labor Relations Board and a cross-petition by the Board for enforcement. The Board, affirming the trial examiner's decision, found that the company had violated Sections 8(a)

5 and 1 of the Act, by refusing to bargain with a certified union, following representation proceedings which are the subject of attack by the company.

On July 27-28, 1964, a hearing was held on the union's representation petition, requesting certification for a unit, limited to "all production and maintenance employees of the company's Dallas plant, located at 2821 Alamo Street." On August 28, 1964, based upon the facts adduced in this hearing, the Regional Director issued a decision and direction of election, finding an appropriate unit consisting of "all production and maintenance employees at the employer's Alamo Street plant *and* its hotel and restaurant department Wood Street plant [also in Dallas] * * * including porters and intra-plant truck drivers" but excluding *inter-alia* employees in the feed lot department [at Milford, Texas] and certain other truck drivers. Petitioners request for review of the Regional Director's action was denied by the Board, since it allegedly "raised no substantial issues warranting review."

Pursuant to the Regional Director's order, an election was conducted on September 22, 1964, resulting in 315 votes being cast for the union, 347 against and 43 challenged ballots. The union filed objection to the following employer conduct, allegedly affecting the outcome of the election: [i] Certain pre-election conduct including the following, "By questioning the employees about how they were going to vote;" [ii] the manner in which the company prevented three alleged employees from voting by denying them access

to the grounds of the company, where the balloting was taking place. Finding that the company had engaged in "conduct reasonably calculated to interfere with a free choice in the election," the Regional Director, on January 12, 1965, set the election aside. The company's request for review of this order was denied by the Board.

The Regional Director then ordered a second election, which was held on February 18, 1965, at a public park near the Alamo Street plant, the reason being given that the company had previously refused to permit employees allegedly entitled to cast challenged ballots to enter its premises. This election resulted in 388 votes for the union, 295 against and 58 challenged votes. During this election, Board agents who were conducting it refused to allow 13 employees, whose ineligible (supervisory) status had been "established" by the Regional Director after the first election, to vote. However, these agents permitted two other employees, previously found ineligible, to cast challenged ballots, after questioning revealed that the duties of these two employees had changed. While the polls were still open, the company requested that the Regional Director allow the 13 "supervisory" employees at least to cast challenged ballots. This request was denied.

Subsequently, the company filed a timely objection to the second election, alleging that certain conduct of the Board agents in the presence of voting employees indicated that the Board favored the union in the election. The Regional Director found this contention to be without

merit and also found that the 13 employees denied ballots had previously been found to be supervisors and were thus properly excluded from the unit. Based upon these findings, he certified the union as the representative of the employees in the appropriate unit. The company's request for a review of this latter decision was denied by the Board as raising no substantial issues warranting review.

The union unsuccessfully sought to bargain with the company; it then filed charges and the complaint in the instant case issued. After the company answered, the general counsel moved for judgment on the pleadings. The trial examiner issued an order to show cause directing the company to indicate the factual issues it intended to raise. Upon consideration of the company's response, the examiner concluded that no factual hearing was required and determined the issues of law in favor of the general counsel.

In view of the state of the record (in effect, the grant of summary judgment), we must assume that for the Board to prevail, any factual issues that may have properly been raised before the Board, are to be viewed most strongly from the standpoint of the company, with the exception of the issue as to the appropriateness of the bargaining unit. As to this, there was a hearing and resolution of the issue by the Director.

In light of the "large measure of informed discretion" committed to the Board in this area of fixing appropriate units," *Packard Co., v. NLRB*, 330 U.S. 485, 491, we con-

clude that the Board's determination that the unit actually designated was an appropriate unit even though some other unit might also have been properly designated, must be affirmed.

The two grounds for setting aside the first election were: (1) the company prevented three persons from entering its premises to cast ballots, and (2) in the period between the filing of the petition and the election, supervisory employees interviewed individual employees, sometimes at places away from their work stations, urging them to vote against the union.

We deal first with the action of the company in turning away from the gate three "employees." It is not disputed that the desirable atmosphere surrounding holding of such an election is what has been described as "laboratory conditions." See *NLRB v. Houston Chronicle Publishing Company*, 5th Cir., 300 F. 2d 273, 278. It is against this background that we test the undisputed facts relating to the denial of access of the three persons to the company's premises. Since there was no resolution of any disputed issues, we must assume the facts to be as stated by the affidavit of Joe Boyd Neuhoff, an employee of the petitioner who was stationed at the main gate of the plant with instructions to not allow unauthorized persons on the premises during the hours of the election.

The Regional Director's notice of election described those eligible to vote as those of the unit "who were employed during the payroll period ending August 27, 1964." It further

provided that "employees who have quit or been discharged for cause since the designated payroll period * * * and who have not been rehired or reinstated prior to the date of the election, shall not be eligible to vote." Neuhoff had a list of the persons who were identified as being on the payroll for the period ending August 27th. This affidavit stated that three former employees of the company,[1] accompanied by two labor organizers, sought to come on to the property and go to the polling place, stationed some 120 feet from the main gate, claiming the right to cast their ballots. Stating that this group "in obvious view of everyone, began to march into the plant through the front gate," Mr. Neuhoff said that he met the group in the middle of the gate and told them in a normal tone of voice that they could not come in to the plant because their names were not on the voting eligibility list. Mr. Neuhoff stated that one of the organizers yelled in a loud voice to Mr. Boyd of the National Labor Relations Board, who was walking across the parking lot, and complained to Mr. Boyd, who then left, after having said nothing. He stated that the organizer, in an angry voice, stated that he was going to get a court order and the response was that he should go ahead and get the order. The three workers remained in the middle of the gate and listened to the conversation.

In his decision, the examiner concluded that the three men should have been permitted to cast challenged ballots,

[1] Two of these had filed unfair labor practice discharge charges with the Board, and the third later filed a similar charge. The Board subsequently upheld the contention of one of these three, finding that he had been discriminatorily discharged and ordered his reinstatement. The other two charges were dismissed.

and set the election aside, "not because the ballots were sufficient in number to have effected the outcome (they were not), but because in excluding potential voters from the premises and not letting them cast challenged ballots, the company violated section 8(a) 1 of the Act (citing Macon Textiles, Inc., 80 NLRB 1525, 1549-1550,) thereby invalidating the election (citing Dal-Tex Optical Co., 137 NLRB 1782, 1786-1787)." After so stating, the Regional Director added "neither can it be said that the above activity [excluding the potential voters] was isolated, as the action was taken in the presence of other voters and in an area clearly visible to employees on their way to vote."

As this court said in *National Labor Relations Board v. Huntsville Manufacturing Company*, 5th Cir., 203 F. 2d 430, "Congress entrusted to the Board the control of the election proceedings and the determination of the steps necessary to conduct an election. NLRB v. Waterman, 309 U.S. 206, 60 S. Ct. 493, 84 L. Ed. 704; Inland Empire Ditrict Council, etc. v. Millis, 325 U.S. 697, 65 S. Ct. 1316, 89 L. Ed. 1877. It was primarily for the Board to determine whether the election was fairly conducted or was unfairly conducted and should be set aside." 203 F. 2d 430, 434. We conclude that the Board here conformed "to the standard of a reasonableness which courts may exact of the Board in the exercise of the discretion accorded it in determining 'whether or not the election should be set aside for irregularities in procedure.'" *NLRB v. Huntsville Manufac-*

turing Co., supra, p. 434. We should therefore not upset the Board's determination that this first election should be set aside.

The Board having concluded that the conduct of the company by having its representative at the gate who turned the workers away "in an area clearly visible to employees on their way to vote" was such as to destroy the "laboratory conditions" desirable for the conduct of a Board election, it is not necessary for us to consider the second issue, touching on the findings that company supervisory employees had questioned employees during the pre-election period. If there are questions of fact as to this issue which were resolved only *ex parte,* and are thus subject to attack, it is not necessary that these questions be resolved in the circumstances now present.

We come next to the contention of the petitioner that the second election was invalid because thirteen members who fell within the category of employees during the payroll period ending August 27, 1964, were not permitted to vote, even by casting challenged ballots, because the Director ascertained that they had theretofore been found to be supervisory employees. As the Board points out, even if all thirteen of these persons had been permitted to vote and had voted against the union, this could not have affected the result. The question therefore is whether the denial by the Board's agents of their request to cast challenged ballots can be equated with the conduct of the company employee Neuhoff in turning away the three employees at the time

of the first election. Again, bearing in mind the degree of discretion which is necessarily lodged in the Board with respect to determining the fairness of elections, it can be readily seen that there is a substantial distinction between what happened at the first election and what happened on the second. It was the Board representative conducting the election who, when the thirteen presented themselves, declined to permit them to cast ballots. This was the act of an impartial Board representative, charged by law with the duty of running a fair election, who, having been informed by the Director that these men were supervisors and thus not eligible, declined to permit them to vote. While, of course, biased conduct by such Board representatives that would destroy the desired "laboratory conditions," would also be a proper basis for setting aside an election, here there is no charge of any fact from which a fact finder could determine that the manner in which the request to vote was turned down could prejudice or deter others of the employees from casting their ballots as they saw fit. We are constrained, therefore, to accept the determination by the Board that the simple conduct of the Board agents in declining the right of these thirteen individuals to cast a ballot did not create an atmosphere that in any way prejudiced the election.

In view of the fact that the ballots of these thirteen individuals would not have affected the results, it therefore becomes unnecessary to determine the correctness of the determination that they were, in fact, supervisors. The petitioner seriously challenges this determination, asserting

that no factual determination, with an opportunity to be fully heard, has been afforded the petitioner on this matter. The Board responds that the failure to have a hearing on any truly contested facts in this regard was the fault of the petitioner in not adequately asserting facts to substantiate such a charge in its effort to obtain a review before the Board. We do not need to determine whether, in fact, the *ex parte* findings here could be supported on the Record as made if this were a critical issue, because, as we have pointed out, it is of no importance to ascertain the correctness *vel non* of the Director's finding that they were supervisors. It is the effect of their challenge that is alleged by the petitioner to have the effect of vitiating the second election. Since this challenge is not valid, we need not ascertain whether, if the finding were crucial, it could stand in light of the procedural posture of the case.

This case is not without difficulty. The Board ascertained that conduct of the respondent denying access to the voting place by three persons who claimed the right to cast ballots (which right was later vindicated as to one), such conduct being in view of other employees, destroyed the "laboratory conditions" desirable for the conduct of the election and thus set aside an election which had been otherwise clearly won by the company; thereafter, at a second election, which otherwise was overwhelmingly won by the union, the Board agents at the voting place declined to permit thirteen persons, found *ex parte* by the

Director to be supervisors, to cast votes. The Board declined to find that this circumstance destroyed the "laboratory conditions."

In spite of the difficulties of the case, however, we conclude that there is a valid basis for distinguishing the two sets of circumstances because of the self-help exercised by the employer in the first instance. Furthermore, the overwhelming vote cast in the second election in favor of the bargaining agent adds weight to the argument that an appellate tribunal must be slow to overrule a discretionary determination by the Board.

The Order will be ENFORCED.

B-12

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 22917

NEUHOFF BROTHERS, PACKERS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

DECREE

Before: Tuttle, Chief Judge, Rives, Circuit Judge, and Choate, District Judge.

THIS CAUSE came on to be heard upon the petition of Neuhoff Brothers, Packers, Inc. to review and set aside an order of the National Labor Relations Board issued against petitioner on August 12, 1965, and upon the cross-petition of the Board for enforcement of said order. The Court heard argument of respective counsel on May 17, 1966, and has considered the briefs and the transcript of record filed in this cause. On June 17, 1966, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the order of the National Labor Relations Board, dated August 17,

1965, directed against Petitioner, its officers, agents, successors, and assigns be enforced, and that Neuhoff Brothers, Packers, Inc., Dallas, Texas, its officers, agents, successors, and assigns abide by and perform the direction of the Board in said order contained.

ENTERED:

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22,917

NEUHOFF BROTHERS, PACKERS, INC.,
Appellants,

v.

NATIONAL LABOR RELATIONS BOARD,
Appellee.

On Petition for Review of an Order of the National Labor Relations Board Sitting at Washington, D. C.

(NOVEMBER 16, 1966)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, RIVES, Circuit Judge, and CHOATE, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

APPENDIX C

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

POINSETT LUMBER & MANUFACTURING COMPANY,
Respondent.

No. 6921

PER CURIAM.

This is a petition to enforce an order of the National Labor Relations Board finding the Poinsett Lumber and Manufacturing Company guilty of unfair labor practices based upon a finding of refusal to bargain and one instance of an alleged threat made to a union employee because of union membership. The refusal to bargain is admitted, but the company claims that the union certified as bargaining agent does not represent a majority of employees in the bargaining unit. An election was conducted under the supervision of the Board but the union received a majority of only a very few votes and the company contends that the result was achieved as the result of threats and pressure exerted on behalf of the union. The company duly filed objections to the election, raising substantial questions as to threats and intimidation and asking a hearing with regard thereto. Instead of ordering a hearing, the Board, acting upon the report of investigation by its Regional Director, certified

the union as bargaining representative notwithstanding the exceptions of the company thereto and its request for a hearing again made. On the hearing in the unfair labor practice proceeding, the company offered evidence of the threats and coercion upon which it relied, but this was excluded by the trial examiner.

The rules and regulations of the National Labor Relations Board clearly contemplate that a hearing shall be granted when substantial questions are raised as to the validity of an election. Section 102.61 of the regulations provides, in part:

> "If exceptions are filed, either to the report on challenged ballots, objections, or both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served upon the parties, a notice of hearing on said exceptions before a hearing officer. The hearing shall be conducted in accordance with the provisions of sections 102.56, 102.57, and 102.58, insofar as applicable. Upon the close of the hearing, the agent conducting the hearing, if directed by the Board, shall prepare and cause to be served upon the parties a report resolving questions of credibility, and containing findings of fact and recommendations to the Board, as to the disposition of the challenges or objections, or both, if it be a consolidated report."

[1] "If the Board had granted a hearing in accordance with this rule, the evidence taken thereon would have been

made a part of the record in the representation proceeding and would have been before the Board in the unfair labor practice hearing and before this court on the review of the Board's action taken with respect thereto. 29 U.S.C.A. § 159 (d). The Board, however, did not grant a hearing to the company but acted upon an investigation made by its Regional Director at which the company was given no opportunity to present the evidence upon which it relied in support of the substantial questions which it had raised as to the validity of the election by the exceptions which it had filed thereto. The Board determined that the questions were not substantial on the basis of the report filed by the Regional Director without affording the company an opportunity to be heard and without having before it the evidence upon which the Regional Director had based his report. Under such circumstances, we think that the company was entitled to present its evidence at the unfair labor practice hearing before the Trial Examiner and that the order should be set aside and the cause remanded to the Board in order that the evidence may be taken and considered by the Board in passing upon the validity of the election.

[2-5] If a hearing had been held and the evidence had been taken and passed upon by the Board in the representation proceeding, the Board would not be required to go into the matter again in the absence of special circumstances showing that it was in the interest of justice that this be done; but the evidence has not been taken nor a hearing accorded the company at any time even though substantial questions affecting the validity of the election had unques-

tionably been raised by its exceptions. We think that it is entitled to a hearing at some stage of the proceedings so that it may produce the evidence upon which it relies for consideration by the Board and for consideration by this court in proceedings to enforce or set aside the Board's order." As said by the Supreme Court in N. L. R. B. v. Indiana and Michigan Electric Co., 318 U.S. 9, 28, 63 S. Ct. 394, 405, 87 L. Ed. 579:

> "The Act accords a great degree of finality to the Board's findings of fact, and this Court has been insistent that the admonition of the Act be strictly observed. But courts which are required upon a limited review to lend their enforcement powers to the Board's orders are granted some discretion to see that the hearings out of which the conclusive findings emanate do not shut off a party's right to produce evidence or conduct cross-examination material to the issue. The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed."

See also N. L. R. B. v. West Texas Utilities Co., 5 Cir., 214 F. 2d 732

[6] On the question as to the threat, we do not think that the finding of the Board that a threat was made is supported by substantial evidence. The language relied on amounts to no more than an expression of opinion that if the employee lost his job he could not get employment in another mill in that area and he might not have a job long. If this language

had been used on the eve of an election or during an organizational campaign it might well have been treated as a threat; but the election was over at the time and no organizational campaign or other union activity was in progress. It appears to be no more than idle conversation between employees of the company, and certainly is not of sufficient importance standing alone to form the basis of a Board order.

The order of the Board will be set aside and the cause will be remanded to the Board with direction to hear the evidence offered by the company with respect to the validity of the election.

Remanded.

C-6

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

THE LORD BALTIMORE PRESS, INC.,
Respondent.

No. 8416.

United States Court of Appeals
Fourth Circuit.

Argued Jan. 5, 1962.

Decided March 19, 1962.

Before SOPER, BRYAN and BELL, Circuit Judges.

ALBERT V. BRYAN, Circuit Judge.

The order of the National Labor Relations Board[1] requiring The Lord Baltimore Press to bargain with Amalgamated Lithographers of America is here resisted, fundamentally, upon the assertion that the election favoring the union as the collective bargaining representative of Baltimore's employees was unfairly conducted. The immediate challenge is to the Board's refusal to accord Baltimore a hearing on its exceptions to the election.

We stay the order's enforcement because of the Board's denial of the hearing.[2] The election's validity is thus made a premature question, to await the outcome of the further proceedings we order.

[1] National Labor Relations Act, § 10(c), 29 U.S.C.A. § 160(c).
[2] Id., § 10(e), 29 U.S.C.A. § 160(e).

On May 8, 1959 Baltimore consented to an election, under the supervision of the Board's Regional Director, to ascertain whether a certain unit of its employees desired Amalgamated as its bargaining representative.[3] The election was held June 11, 1959 and the union won. Next day Baltimore filed objections to the election, at the same time asking that it be set aside. Presently pertinent, the objections stated that:

> "(1) During the period immediately prior to the election Employer supervisory personnel engaged in organizing and other activities on behalf of the Union, by which employees were induced, coerced and caused to favor the Union, sign cards for the Union and vote for the Union, all of which was unknown to the Employer until after the election."

The supervisory personnel to which Baltimore had reference was one Creston E. Ford, the foreman of its lithographic department. Following an ex parte investigation, including in camera interviews with the witnesses of whom it was apprised by the employer, the Regional Director concluded that the objections should be overruled and Amalgamated certified as the exclusive representative of the Baltimore employees. To this report Baltimore filed exceptions. The Board denied them without a hearing, thinking a hearing unwarranted and unsought, and accordingly certified Amalgamated.

Thereafter, Baltimore declined to bargain with the union, contending that its selection as the collective agent was invalid. At the union's instance the Board issued a complaint

[3] Id., § 9(c) (1) and (2), 29 U.S.C.A. § 159(c) (1) and (2).

accusing Baltimore of an unfair labor practice as defined in § 8(a) (5) and (1) of the Act, 29 U.S.C.A. § 158(a) (5), (1). In the hearing on this complaint before the Examiner, Baltimore proffered oral and documentary evidence purporting to delineate the activities of Ford. Quoting from the offer made before the Examiner, the evidence it tendered would show that

> "He [Ford] said that he knew the company had done and would do some dirty tricks to us and told them to look at what they have done to me. Further, that Mr. Ford told employees under his supervision 'you fellows better sign a card and send them in' under circumstances in which it was perfectly clear that he was talking about union cards which were the only cards being circulated in the plant at the time.
>
> "Further, that Mr. Ford told witnesses under his supervision that the plant superintendent was just a hatchet man and the men had better get together and get the union in.
>
> "Further, that many times and immediately before the election Mr. Ford stated to employees under his supervision that the plant wasn't a family affair any longer, that the men didn't any longer have the security they had before and that the fellows ought to have a union to protect themselves."

This evidence the Examiner declined to hear. He was of the opinion that as the Board had already decided the dispute in the representation proceeding, the question was no longer open. Whereupon on his recommendation the Board entered the order it now seeks to enforce.

With the respondent Baltimore, we think it should have been heard on its exceptions in the election proceeding.

Indwelling, of course, was a request for a hearing upon them. The Board's Rules and Regulations, Section 102.69, allowed such a hearing. But we need not now enlarge on the point because, in the absence of a hearing at that stage, the employer should certainly have been accorded a hearing thereon in the complaint proceedings, and we discuss the point under that head.

[1] The Examiner and the Board clearly erred in rejecting the testimony when last offered. Ford's activities—if true—could not be lightly brushed off. The Board has repeatedly declared, and again recognizes in its brief here, that advocacy of the union by a supervisor-employee, unknown to the employer, is cause for annulment of the election. Shovel Supply Co., 118 N.L.R.B. 315 (1957); Parkchester Machine Corp., 72 N.L.R.B. 1410 (1947); Robbins Tire & Rubber Co., 72 N.L.R.B. 157 (1947). Awareness by Baltimore of Ford's aiding of the union is not indicated in the evidence. Entreaties and importunities of the kind here suggested were not permissible and protected—"privileged"—under 8(c) of the Act, 29 U.S.C. 158(c) as expressing only "* * * views, argument, or opinion * * *". Nor would they necessarily be neutralized by the alleged oral and written attempts of Baltimore to persuade the employees against unionization. It must be remembered that Ford denied any untoward conduct on his part. Whatever the truth the employer should have had an opportunity to present its side.

Baltimore's strictures on the supervisor's electioneering, given increased countenance by a show of proof, raised "substantial and material factual issues". Rules and Regulations, supra, Sec. 102.69(d). Actually, the report of the Regional Director in the election proceeding itself reflects evidence of partisan remarks by Ford, particularly "that he [Ford] knew that the Company had done some dirty tricks to us, 'look what they done to me' " and "the plant superintendent was just a hatchet man".

Such words would come with particular force from Ford. He had once been a superintendent and only recently demoted. His admonitions were directed to subordinates and he talked from 37 years of experience with Baltimore. Just then the company was in a critical period, passing from a family proprietorship of 80 years to a new ownership, a transition already creative of uneasiness among the employees. Though away on vacation from May 30 until June 9 (two days before the election), it is not clear that Ford's absence erased his earlier campaigning.

The right of the employer to the audience of the Board in these circumstances was enjoined upon the Board in N.L.R.B. v. Poinsett Lumber & Mfg. Co., 221 F. 2d 121 (4 Cir. 1955) by this court with precise language, as follows:

> "If a hearing had been held and the evidence had been taken and passed upon by the Board in the representation proceeding, the Board would not be required to go into the matter again in the absence of special circumstances showing that it was in the interest of justice that this be done; but the evidence has not

> been taken nor a hearing accorded the company at any time even though substantial questions affecting the validity of the election had unquestionably been raised by its exceptions. We think that it is entitled to a hearing at some stage of the proceedings so that it may produce the evidence upon which it relies for consideration by the Board and for consideration by this court in proceedings to enforce or set aside the Board's order. * * *".

Similar holdings prevail elsewhere, N.L.R.B. v. Tampa Crown Distributors Inc., 272 F. 2d 470 (5 Cir. 1959); N.L.R.B. v. Dallas City Packing Co., 230 F. 2d 708 (5 Cir. 1956); N.L.R.B. v. West Texas Utilities Co., 214 F. 2d 732 (5 Cir. 1954).

[2, 3] Certification of the election did not irrevocably seal it against review. Altogether interlocutory—just a step in the enforcement proceeding—it was as a matter of law subject to vacation or revision at any time before the trial of the unfair labor practice complaint became final. Pittsburgh Plate Glass Co. v. N. L. R. B., 313 U.S. 146, 162, 61 S. Ct. 908, 85 L. Ed. 1251 (1941).

The order of the Board will be set aside with a direction to hear Baltimore's evidence and arguments in objection to the election.

Order set aside and remanded.

C-12

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CAPITAL BAKERS, INC.,
Respondent.

No. 15079

United States Court of Appeals
Third Circuit.

Before HASTIE and FREEDMAN, Circuit Judges, and WEBER, District Judge.

WEBER, District Judge.

This case is before the Court on the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq. for enforcement of its order dated August 25, 1964. The Board found that respondent violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the Union as the duly elected and certified representative of its employees. This case involves one out of four of respondent's plants [Paxton Street plant, Harrisburg, Pa.] upon which petitions were heard on a consolidated record resulting in findings that each was an appropriate bargaining unit, and directing that an election be held.

At the hearing on the petition respondent contested the appropriateness of the single plant unit. Respondent did not request the Board to review this finding.

At the election, of 62 ballots 31 favored the Union, 29 were opposed, and 2 ballots were challenged by the Union. The Regional Director conducted an administrative investigation, overruled one challenge and sustained one. The challenged ballot which was overruled was not counted because it would not change the result, and the Union was accordingly certified. Respondent made a request for hearing at this time.

A Request for Review was filed by the respondent with respect to the sustained challenge on the grounds that the Regional Director had denied respondent a hearing with respect to the supervisory status of the challenged employee. The Request for Review was denied without hearing.

The respondent refused to recognize or bargain with the Union and an Unfair Labor Practice charge and hearing followed. Here respondent contended that the single plant unit was inappropriate but the Trial Examiner refused to pass on this issue on the grounds that respondent's failure to seek a review of the original representation decision precluded litigating this issue in any subsequent unfair labor practice proceeding.[1] Also, respondent sought to introduce evidence on the alleged supervisory status of the challenged employee. The Trial Examiner refused to pass on this issue

[1] N.L.R.B. Rules and Regulations, Series 8, Sec. 102.67(f):
"The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

on the grounds that the Labor Board's refusal of Request for Review of this issue could not be relitigated under the Board's Rules. A detailed offer of proof was made on the record but was rejected by the Trial Examiner. Respondent also claimed that it was improperly denied a hearing on the question of the alleged supervisory status of the challenged ballot. The Trial Examiner rejected this contention on the grounds that it had been examined and rejected by the Board on the Request for Review, and, absent newly discovered evidence, the issue could not be relitigated in the complaint hearing.

This petition for enforcement followed. Respondent admits that it has refused to recognize and bargain with the Union, but asserts that the Labor Board's findings and conclusions that respondent violated the Act are not supported by substantial, material and valid evidence on the record considered as a whole, as required by the Act, and are erroneous as a matter of law. Specifically, respondent contends that:

> (1) The Board's determination that the challenged employee was supervisory was made on the basis of an ex parte investigation and without granting a hearing which deprived respondent and its employees of their rights under law; and
>
> (2) The direction of an election in a single plant unit was erroneous and contrary to the requirements of the National Labor Relations Act.

I.

THE APPROPRIATE BARGAINING UNIT DETERMINATION.

Respondent argued that the determination of the appropriate bargaining unit in this case was made by the Labor

Board in violation of Section 9(c) (5) of the Act which provides that:

"In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c) (5).

In support of this argument respondent points to its history of representation petitions. Respondent operates six bakery plants within an 85 mile radius of Harrisburg, Pennsylvania. In 1956 and in 1960 the Board held that a unit of employees in a single plant of respondent was not appropriate, holding that:

> "the high degree of integrated, centralized and detailed managerial control of labor relations policies for all the plants, the interdependence of the plants in the Employer's production and distribution system, the similarity of functions of all the production and maintenace employees, and their uniform working conditions and fringe benefits" (Joint Appendix p. 1366).

all compelled a conclusion that a single plant unit was not appropriate. (Case No. 4—RC—4091). In 1961, the parent organization of the Union involved here agreed to and the Labor Board directed an election in a multi-plant unit of all respondent's plants, which the Union lost. In 1963 the Board reversed its 1960 position and directed an election in a single plant unit in Williamsport on petition of a local of the Teamsters Union. A Request for Review of the unit determination was denied, but the Union lost the election. Also in 1963, at the Pottsville plant, the Board directed a

single plant unit election for a Teamsters Union Local, the respondent requested Review which was denied, and the Union lost the election.

The present proceeding grew out of four single plant representation petitions in 1963 for four of respondent's plants, and the determination by the Regional Director after hearing, that each of said plants was an appropriate unit for the production and maintenance employees. The respondent did not file a Request for Review of this determination, but filed its Request for Review on the supplemental determination of the Regional Director concerning the contested ballots in the election. In this Request for Review respondent stated that it was not abandoning its objection to the unit determination but it devoted its arguments to the challenged ballot issue. The Trial Examiner at the unfair labor practice hearing held that under Sec. 102.67(f) of the Board's Rules and Regulations the respondent's failure to request review of this finding precluded it from being raised at this time, in the absence of any evidence unavailable at the time of the representation hearing. Respondent did not seek to introduce further testimony on the unit issue, but argued that the finding of a single plant unit was a reversal of prior determinations of the Board without proper justification.

Section 10(e) of the National Labor Relations Act provides:

> "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e).

This has not only been held to preclude judicial consideration of issues not raised before the Board, N. L. R. B. v. Local 476, United Association of Journeymen of the Plumbing & Pipefitting Industry, AFL-CIO, 368 U.S. 401, 402 (1962), 82 S. Ct. 423, 7 L. Ed. 2d 382; N. L. R. B. v. Ochoa Fertilizer Corp., 368 U.S. 318, 322, 82 S. Ct. 344, 7 L. Ed. 2d 312 (1961), but also to apply where an issue litigated before the Trial Examiner has not been raised by a timely exception to a determination of the Board by Request for Review. N. L. R. B. v. Mooney Aircraft, Inc., 310 F. 2d 565, 566 (5th Cir., 1962); N. L. R. B. v. Giustina Bros. Lumber Co., 253 F. 2d 371, 374 (9th Cir., 1958).

Petitioner argues that to have raised the unit representation issue in 1963 in this case would have been futile in the face of adverse determinations in two cases within a few months prior to the present case where respondent's requests to review unit determinations had been refused by the Board.

[1] While technically respondent failed to request review of the unit determination of the Regional Director, respondent did contest this issue at the representation hearing it reserved this question in its Request for Review of the post-election report, it argued this issue before the Trial Examiner at the unfair labor practice hearing. We feel that the respondent is not now barred from raising this objection before the Court since this has been his position from the inception of the proceedings, and the Board has been adequately appraised of his intention to rely on this. N. L. R. B. v. Eastern Mass. St. Ry. Co., 235 F. 2d 700, cert. den. 352

U.S. 951, 77 S. Ct. 325, 1 L. Ed. 2d 242 (1st Cir. 1956); N. L. R. B. v. Revere Metal Art Co., 280 F. 2d 96, cert. den. 364 U.S. 894, 81 S. Ct. 225, 5 L. Ed. 2d 189 (2nd Cir., 1960).

In fact, at the unfair labor practice hearing, the Trial Examiner specifically noted that respondent was precluded from court review of the representation case, and that the appropriate means of testing the result was to take the risk of refusing to bargain, and to challenge the finding in the unfair labor practice complaint proceeding. That is what respondent was trying to do. The Trial Examiner added:

> "Certainly it is not my function to prevent Respondent from adequately presenting its case in whatever forum is proper, and I do not so view my function."

Subsequent to the argument of this petition, the Supreme Court has decided the case of N. L. R. B. v. Metropolitan Life Insurance Company, 380 U.S. 438, 85 S. Ct. 1061, 13 L. Ed. 2d 951 (April 5, 1965). This was a unit determination case (among a number of others from the various circuits) in which the Board by a change of policy certified a single office unit of the insurance company as an appropriate unit. The Court of Appeals for the First Circuit refused to enforce the Order on the grounds that because of the Board's failure to articulate specific reasons for its unit determination, the Board's apparently inconsistent determination of appropriate units of respondent's employees in other cities and regions, its failure to discuss what weight, if any, it gave to the factor of the extent of unit organization, and the fact that in these cases the Board consistently certified

the unit requested by the Union, the Court could only conclude that the Board had regarded the extent of Union organization as controlling in violation of the provisions of Section 9(c) (5) of the Act. 327 F. 2d 906.

On appeal the Supreme Court held, 380 U.S., at page 442, 85 S. Ct., at page 1063:

> "We agree with the Court of Appeals that the enforcing court should not overlook or ignore an invasion of the § 9(c) (5) command. We further agree that in determining whether or not there has been such an evasion, the results in other recent decisions of the Board are relevant. We cannot, however, agree that the only possible conclusion here is that the Board has violated § 9(c) (5).
>
> * * *
>
> On the other hand, due to the Board's lack of articulated reasons for the decisions in and distinctions among these cases, the Board's action here cannot be properly reviewed. When the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 197, 61 S. Ct. 845, 854, 85 L. Ed. 1271. See Burlington Truck Lines v. United States, 371 U.S. 156, 167-169, 83 S. Ct. 239 245-246, 9 L. Ed. 2d 207; Interstate Commerce Comm'n v. J-T Transport Co., 368 U.S. 81, 93, 82 S. Ct. 204, 211, 7 L. Ed. 2d 147. Although Board counsel in his brief and argument before this Court, has rationalized the different unit determination in the variant factual situations of these cases on criteria other than a controlling effect being given to the extent of organization, the integrity of the administration process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency action * * *.' Burlington Truck Lines v.

> United States, supra, 371 U.S. at 168, 83 S. Ct. at 246; see Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 196, 67 S. Ct. 1575, 1577, 91 L. Ed. 1995. For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review." (Footnotes omitted).

Certiorari had been granted in the above case because of a conflict between the Circuit Courts of Appeals on the same unit determination questions involving insurance companies. All were remanded to the Circuits for remand to the National Labor Relations Board for further proceedings consistent with this opinion. See Metropolitan Life Ins. Co. v. N. L. R. B., 380 U.S. 523, 85 S. Ct. 1325, 14 L. Ed. 2d 265, reversing 328 F. 2d 820 (3rd Cir.); Western & Southern Life Ins. Co. v. N. L. R. B., 380 U.S. 522, 85 S. Ct. 1326, 14 L. Ed. 2d 265, reversing 328 F. 2d 891 (3rd Cir.); Metropolitan Life Insurance Co. v. N. L. R. B., 380 U.S. 525, 85 S. Ct. 1326, 14 L. Ed. 2d 265, reversing 330 F. 2d 62 (6th Cir.).

[2] Examining the determination of the Board in the instant case, we find a striking parallel. The Regional Director made his determination on the appropriateness of a single unit on the basis of (1) community of interest, (2) geographical separation, (3) substantial authority of plant managers, (4) little employee interchange between plants, and (5) no history of collective bargaining in any plant and no organization seeking broader based representation. All of these are, in themselves valid reasons, as they were so held by this court in Metropolitan Life Insurance Co. v. N. L. R. B., 328 F. 2d 820.

But here, as in the Metropolitan Life Insurance Company cases, the Board makes no attempt to explain its departure from its prior determinations with regard to the same plants of employer in prior years. Again, as in Metropolitan, the explanation is set forth in the brief of counsel for the Board; a change in Board policy in 1961 in which the Board has been more prone to find single plant or less than company-wide units appropriate. But, as Justice Goldberg stated in Metropolitan, this substitutes counsel's rationale and the Court's discretion for that of the Board.

[3] In our opinion the prior history of this respondent required that the Board explain its departure from its prior determination. As stated in N. L. R. B. v. Metropolitan Life Ins. Co., 380 U.S. 438, at p. 443, 85 S. Ct. 1061, at p. 1064 (note 5):

> "Moreover, the Board made no attempt to distinguish other cases, particularly the Chicago and Cleveland cases discussed supra, in which it certified different types of units. The unfair labor practice proceeding added nothing to the analysis, as the trial examiner did not review the issue, as he felt was 'bound by the Board's ruling in the representation proceeding.' * * * and the Board affirmed the trial examiner's ruling without discussion * * *."

II.

The Denial of a Hearing.

Respondent complains here, as it has in three prior stages of the proceedings, that it has been denied a right to a hearing on a substantial and material issue, the sustaining of a

challenge to a ballot which could determine the result of a representation election.

The importance of this single issue is shown by the respondent's history. After a series of representation petitions had been denied because the Labor Board had determined single plants not to be appropriate units the Labor Board changed its prior stand and determined that four individual plants were each appropriate units. In the plant in question 62 ballots were cast, 31 for the Union, 29 against, 2 challenged by the Union. One challenge was sustained on the grounds that it involved a supervisory employee. This is the one at issue, and its inclusion with the other unopened ballot could change the result.

The determination to sustain the challenge was made by the Regional Director on the basis of an ex parte investigation. Respondent requested and was denied a hearing on the question at the time of the Regional Director's administrative investigation.

Again in its Request for Review, respondent repeated its request for hearing on the status of the alleged supervisory employee whose ballot was critical setting forth in detail its facts in support of this contention. Review was denied by the Board on the basis that it raised no substantial issues warranting review. The Board now argues that "To this considerable extent the Company was 'heard' ".

At the hearing before the Trial Examiner on the unfair labor practice, respondent challenged the prior findings on the supervisory status of the employee concerned. The Trial

Examiner rejected a detailed proffer of evidence to prove that said employee was not a supervisory employee on the grounds that this issue was determined by the Board's decision on the Petition for Review, and absent newly discovered evidence, could not be heard by him.

The Rules and Regulations of the National Labor Relations Board, Series 8, provide:

> § 102.69(c). "* * * if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both * * * such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing on the basis of a hearing before a hearing officer, designated by the regional director."

"The extensive nature of the Regional Director's report in which he details the results of his investigation of the supervisory nature of the duties of the challenged employee clearly establishes the existence of such "substantial and material factual issues." The printed record contains over five pages of discussion of the factual bases for his determination. Yet all of the evidence upon which he relied is derived from statements which were not subject to cross-examination or confrontation or to any legal tests for determining their use or weight as evidence."

The Board, on the Request for Review, refused to grant a hearing. The Rules and Regulations provide:

> § 102.69(e): "If it appears to the Board that such exceptions raise substantial and material factual issues,

> the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer."

Section 10(b) of the Labor Management Relations Act, with reference to procedure upon complaint of violation, requires a hearing. It further provides:

> "* * * The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint." 29 U.S.C. § 160(b).

"[4] The Regional Director's report on the post-election ballot challenges reveals that he at least collected a considerable amount of information, whatever probative value it may have to support a conclusion that the employee was supervisory. Respondent requested an opportunity to have these facts determined by a hearing. This was denied, and its subsequent request to the Board for hearing was denied. The nature of the evidence which respondent wished to present is revealed both in its Request for Review and in its offer of proof before the Trial Examiner on the unfair labor practice proceeding. The respondent there set forth in detail several factual matters which it offered to prove to contradict facts found by the examiner in his report based on ex parte investigation. Respondent's offer of proof also contained clearly relevant facts which were not mentioned in the Regional Director's findings. We are not concerned with the question of whether or not the evidence considered by the Regional Director is sufficient to support his finding, or whether the rejected evidence of respondent would over-

come the findings; we are solely concerned with the fact that the offer and the findings raise a substantial conflict of fact which the Board's Rules and Regulations require to be determined by a hearing. If this was not apparent to the Board at any prior stage it became clearly apparent at the Trial Examiner's hearing. The circumstances compelled a hearing, at the very least, at this stage."

It is apparent that the status of the employee whose ballot was challenged presents a substantial factual issue. The extent of the Regional Director's discussion of facts attests to its substance. The materiality is proven by the fact that this vote could determine the result. Therefore, the failure to determine this issue on the basis of a hearing constitutes a clear abuse of discretion on the part of the Regional Director, which has been allowed to stand at the successive stages of the proceedings on the grounds that the original determination was not open to subsequent review. Not only the Rules and Regulations, but due process of law demands that a hearing be held on this contested factual issue at some stage of the administrative proceeding before respondent's rights can be affected by an enforcement Order.

Decisions in the courts of appeal for several circuits all support respondent's contentions specifically with respect to challenged ballots.

In N. L. R. B. v. Sidran, 181 F. 2d 671 (5th Cir. 1950), the Regional Examiner found facts and made a determination on contested ballots upon an ex parte administrative

investigation. The Board upheld the Regional Director's findings. The Circuit Court, upon enforcement proceedings, stated:

> "Manifestly, the Board's action in considering such report was not within its discretionary power, but under the circumstances arbitrarily deprived respondent of a fair trial." 181 F. 2d at 673.

In N. L. R. B. v. Poinsett Lumber & Mfg. Co., 221 F. 2d 121 (4th Cir. 1955), where objections to the conduct of the election were raised and disposed of by the Regional Director on administrative investigation, and where hearing before the Board and the Trial Examiner were refused on the factual issues, involving a representation election, the Court stated:

> "We think that it is entitled to a hearing at some stage of the proceedings so that it may produce the evidence upon which it relies for consideration by the Board and for consideration by this court in proceedings to enforce or set aside the Board's order." (p. 123).

In another challenged ballot case, N. L. R. B. v. Joclin Mfg. Co., 314 F. 2d 627 (2nd Cir. 1963), the Regional Director filed a report based on an ex parte investigation to which employer excepted. Again at the review stage and at the complaint stage the employer was denied the right to produce testimony. Citing and following N. L. R. B. v. Sidran (Cit. supra), the Court stated:

> "In consequence a court cannot properly enforce an order finding an employer guilty of an unwarranted refusal to bargain with a union certified in an election if it appears, with respect to challenges affecting the result, either that they were disposed of erroneously as a matter of law or that the employer raised 'substantial

> and material factual issues' under the Regulations and was denied a hearing that he seasonably requested." (pp. 631-632).

See also N. L. R. B. v. Dallas City Packing Company, 230 F. 2d 708 (5th Cir. 1956), and N. L. R. B. v. Lord Baltimore Press, Inc., 300 F. 2d 671 (4th Cir. 1962).

Both parties have recited the factual situation with regard to the challenged employee at length in briefs, and the Regional Director's report discussed it in detail. This only substantiates our conclusion that this was "a substantial and material factual issue."

We are of the opinion, therefore, that both a proper application of the Board's Regulations, and the requirements of due process demanded a hearing on the factual issues surrounding the employment of the challenged voter. The history of prior representation petitions, the disputed appropriate unit questions, and the closeness of the vote making the challenged ballot critical, all support the conclusion that a hearing on the challenged ballot was the only fair and proper method of procedure. Where all of these circumstances co-exist all procedural safeguards ought to be used. Only a hearing can supply this. As stated by Chief Justice Hughes in Morgan v. United States, 304 U.S. 1, at page 18, 58 S. Ct. 773, at page 776, 82 L. Ed. 1129:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them."

These safeguards were missing in the present action.

A decree will be entered denying the Board's petition for enforcement.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 985

NEUHOFF BROS. PACKERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B–1 to B–11) is reported at 362 F. 2d 611. The Board's decision and order (R. 358–371; 382–385) [1] is reported at 154 NLRB 438.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1966 (Pet. App. B–1). Petitioner's request for rehearing was denied on November 16, 1966 (Pet. App. B–14). The petition for a writ of certiorari was filed on January 19, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the transcript of record (Vol. 1) in the court below.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), and of the Board's Rules and Regulations (29 C.F.R. § 102.1 *et seq.*), are set forth in the Appendix, *infra*, pp. 9–11.

QUESTION PRESENTED

Whether an employer was entitled to an evidentiary hearing on objections to two representation elections, where the objection to the first election did not raise a material issue of fact, and the objection to the second election not only likewise presented no material issue of fact, but could not affect the outcome of that election.

STATEMENT

Petitioner (the Company) is engaged in the slaughter of livestock and the processing and sale of the carcasses (R. 14–15, n. 3). In July 1964, the United Packinghouse, Food and Allied Workers of America, AFL–CIO (the Union) filed a petition with the Board requesting certification as the bargaining agent for a unit of the Company's employees (R. 1–12). On September 22, 1964, the Board conducted a representation election in which 315 votes were cast for the Union, 347 against, and 43 ballots were challenged (R. 41–42). The Union filed timely objections to the election (R. 45–53), which the Board's Regional Director investigated. The Director found, on the basis of undisputed evidence, that, in the presence of other voters and in an area clearly visible to employees on their way to vote, a Company official refused to permit three previously discharged em-

ployees to enter the plant and vote, even though he was advised by a Board agent that the three employees were eligible to cast ballots (R. 71–72).[2] The Director further found that, prior to the election, the Company's supervisors individually interviewed employees away from their work stations and urged them to vote against the Union (R. 67–69). On the basis of these findings, the Director concluded that the Company had engaged in "conduct reasonably calculated to interfere with a free choice in the election," and therefore set aside the election and ordered a new one (R. 91). The Board denied the Company's request to review the Regional Director's decision (R. 92–119), on the ground that "it raises no substantial issues warranting review" (R. 119–120).

A second election was held on February 18, 1965, in which 388 votes were cast for the Union, 295 against, and 58 ballots were challenged (R. 125–126). The Company filed timely objections to the election, alleging that the conduct of Board agents in refusing to permit 13 persons to cast ballots impaired the validity of the election (R. 128–164). The Regional Director, upon investigation, found that the 13 individuals had been denied ballots because, in connection with the first election, they had been found to be supervisory personnel. Since these employees were thus not eligible to vote, he concluded that their exclusion was proper (R. 167–171). Accordingly, the Director overruled the Company's objections and certified the

[2] A Board Trial Examiner had issued a decision finding that two of the employees had been discharged in violation of the Act (R. 71; see also Pet. App. B–6, n. 1).

Union as the bargaining representative of the Company's employees (R. 171–172). The Board again denied the Company's request for review of the Director's decision (R. 173–189), because "no substantial issues warranting review" were raised (R. 190–191).

Thereafter, the Company refused the Union's request to bargain, the Union filed unfair labor practice charges (R. 191–194), and a complaint was issued (R. 195–214). Pursuant to the General Counsel's motion for judgment on the pleadings (R. 223–252), the Trial Examiner directed the Company to indicate the factual issues it intended to raise (R. 287–293). Upon consideration of the Company's response (R. 311–350), the Examiner found that there was no dispute as to the facts upon which the Regional Director had relied in setting aside the first election, and that, as to the second election, a bare allegation challenging the manner in which Board agents had refused ballots to individuals already determined to be supervisory personnel did not raise an issue of fact (R. 364–365). The Examiner further found that the issues of law raised by the Company had already been decided in the representation proceedings, and that he was bound by those determinations (R. 365–366). Accordingly, the Examiner, granting the motion for judgment on the pleadings, held that the Company had violated Sections 8(a)(5) and 8(a)(1) of the Act by refusing to bargain with the Union (R. 359, 366). The Board affirmed the Examiner's conclusion and ordered the Company to bargain, on request, with the Union (R. 382–385). Upon review, the court of appeals held

that the Board's order should be enforced, rejecting the Company's attempt to have that order set aside (Pet. App. B–1 to B–11).

ARGUMENT

The petition is predicated on the premise that the objections to the representation elections in this case presented material issues of fact, which the Board should not have decided without an evidentiary hearing.[3] But, as shown below, the objection as to the first election which was decisive presented no material issue of fact, and the objection as to the second election related to a matter which could not affect the result of the election, and likewise presented no material issue of fact. In these circumstances, the court below correctly concluded that the Board properly disposed of the objections without an evidentiary hearing.[4] There is thus no occasion for further review.

1. The first election was validly set aside if *either* of the two grounds relied on by the Regional Director is sustainable (see note 6, *infra*). With respect to the Company's action in preventing three persons from voting, the court below found that the undisputed

[3] Section 102.69(c) of the Board's Rules (Appendix, *infra*, pp. 10–11) provides for an evidentiary hearing where objections present "substantial and material factual issues."

[4] In reaching its result, the court below indicated that it was assuming, in light of the procedural posture of the case, "that for the Board to prevail, any factual issues that may have properly been raised before the Board, are to be viewed most strongly from the standpoint of the company," except for that relating to "the appropriateness of the bargaining unit," as to which "there was a hearing and resolution of the issue by the Director" (Pet. App. B–4). See note 5, *infra*.

facts[5] were that three former employees, accompanied by two labor organizers, "'in obvious view of everyone, began to march into the plant through the front gate'." They were met "in the middle of the gate" by Mr. Neuhoff (see note 5, *supra*), who "told them in a normal tone of voice that they could not come in to the plant because their names were not on the voting eligibility list" (Pet. App. B–6). With these facts undisputed, there was no need for an evidentiary hearing since only a legal issue was presented—*i.e.*, whether the conduct of the Company representative, in turning workers away "in an area clearly visible to employees on their way to vote," was such as to destroy the "laboratory conditions" desirable for the conduct of a Board election (see Pet. App. B–8). And, as the court below correctly concluded (Pet. App. B–7 to B–8), the Board was not unreasonable in finding that the exclusion tended to have such an effect and in setting aside the first election on that ground.[6]

2. No substantial basis for setting aside the second election (which the Union won) is presented by

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[5] The Board and the court of appeals accepted as true the facts stated in the affidavit (R. 345–347) of Joe Boyd Neuhoff, an employee of the Company who was stationed at the main gate of the plant with instructions not to permit unauthorized persons on the premises during the election (Pet. App. B–5).

[6] Since the exclusion of the three employees was, without more, a sufficient basis for setting aside the election, the court below found it unnecessary "to consider the second issue, touching on the findings that company supervisory employees had questioned employees during the pre-election period" (Pet. App. B–8).

petitioner's contention that it was entitled to a hearing on whether the 13 individuals, who were denied ballots by Board agents on the grounds that they were supervisory personnel, were in fact in that category. As the court below pointed out, it was unnecessary to determine that issue, for "even if all thirteen of these persons had been permitted to vote and had voted against the union, this could not have affected the result" (Pet. App. B–8). Moreover, although the Company contended that the place and the manner in which the 13 individuals were denied ballots was improper, at no time before the Board was the basis for this contention particularized. Certainly, as the court below properly concluded (Pet. App. B–9), the denial of ballots by "an impartial Board representative," without more, does not provide a sufficient ground for setting aside an election or for holding an evidentiary hearing.[7]

3. There is no conflict among decisions. The cases relied on by petitioner in this regard (Pet. 8–9) are distinguishable, for in them, unlike here, it was found that the objections raised material issues of fact, requiring an evidentiary hearing.

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[7] Nor is a different conclusion required because of the Board's action in setting aside the first election. The Board could reasonably conclude that the exclusion of voters by a Company representative tended to create an atmosphere that prejudiced the election, whereas comparable action by a neutral Board representative neither created such an atmosphere nor indicated that the Board favored the Union in the election.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1967.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are as follows:

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

SEC. 9. (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a ques-

tion of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

The relevant provisions of the National Labor Relations Board Rules and Regulations, Series 8, as amended (29 CFR Sec. 102.1 *et seq.*), are as follows:

SEC. 102.69 Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.—

* * * * *

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both. If a consent election has been held pursuant to section 102.62(b), the regional director shall prepare and cause to be served on the parties a report on challenged ballots or objections, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D.C. Within 10 days from the date of issuance of the report on challenged ballots or objections, or both, * * * any party may file with the Board in Washington, D.C., eight copies of exceptions to such report * * *. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith

upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases. If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to section 102.62(b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer, designated by the regional director. * * *

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